No. 10,505

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINDA H. HALE,
Appellant,

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,
Appellee.

APPELLANT'S REPLY BRIEF.

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SUMMARY OF CERTAIN FACTS.

Before responding to the argument advanced by Appellee in his Brief, it is desired to set forth for ready reference certain facts which appear from the record.

The will of Prentis Cobb Hale, Sr. provided in part that:

(a) The sum of $10,000.00 in cash and all automobiles owned by the testator be given to Appellant (R. 45), and

(b) Certain real and personal property be distributed to a trustee to be held in trust for the use and benefit of Appellant (R. 45); the net in-

come of the trust fund to be paid to Appellant during the term of her natural life (R. 47), and

(c) In the event Appellant should elect to take any portion of the estate as community property, then the property to be transferred in trust for Appellant under (b) next preceding should be reduced by the appraised value of the property taken as community property by Appellant (R. 44, 45).

Stating the facts regarding the will of Prentis Cobb Hale, Sr. negatively as to Appellant, it can be said that the will of Prentis Cobb Hale, Sr. did not:

(a) Make a bequest to Appellant of any money or other property equal to her community interest in her husband's estate, and neither did the will;

(b) Make either a specific or demonstrative bequest to Appellant of the particular securities distributed to Appellant under paragraph 1 of the compromise agreement of June 18, 1937, and neither did the will;

(c) Make any provision whatsoever for the payment to Appellant of the sum of $6230.00 representing *gross* amount of dividends received by the Estate of Prentis Cobb Hale, Sr. subsequent to his death and prior to the agreement of June 18, 1937.

Although the will of Prentis Cobb Hale, Sr. did not provide for the distribution to Appellant of any real property or securities or gross dividends thereon, un-

diminished by any expenses of the estate or testamentary trust, the compromise agreement of June 18, 1937 did provide that there should be delivered and there were actually delivered to Appellant:

(a) Certain real and personal property set forth in paragraph 1 of the agreement (R. 40, 41), and

(b) Pursuant to paragraph 8 of the agreement, all dividends on the securities referred to in paragraph 1 which had been received by the Executors, which dividends aggregate $6230.00 and are here in controversy (R. 36, 42, 61, 62).

RESPONSE TO ARGUMENT OF APPELLEE.

1. CONTENTION OF APPELLEE THAT SPECIFIC PROPERTY AND NOT THE INCOME THEREON IS SOLE MEASURE OF APPELLANT'S COMMUNITY INTEREST.

Appellee states that the $6230.00 income earned on the properties distributed to Appellant under paragraph 1 of the agreement of June 18, 1937 was not included in determining the value of the property received in satisfaction of her community interest (Br. 11). In support thereof Appellee refers to a portion of the agreement of June 18, 1937 which provides that there should be distributed to Appellant property having a value of $338,672.00

> "* * * in satisfaction of the said one-half interest in the said community property to which the said Linda Hoag Hale is entitled as aforesaid."

The procedure followed by Appellee in selecting approximately 3 lines of the entire agreement of June 18, 1937 to represent the complete intention and agreement of the parties is improper because it violates one of the fundamental rules concerning the interpretation of contracts.

Section 1641 of the California Civil Code reads as follows:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Section 1650 of the California Civil Code reads as follows:

> "Particular clauses of a contract are subordinate to its general intent."

The California Supreme Court in *Skookum Oil Co. v. Thomas,* 162 Cal. 539, 123 Pac. 363, at the bottom of page 366, used the following language in connection with the interpretation of a contract:

> "* * * The rules of construction forbid seizing upon some isolated provision of a contract in order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument. * * *"

The California Court in *Nelles v. Macfarland,* 9 Cal. App. 534, 99 Pac. 980, at the bottom of page 981, used the following language in the course of its opinion concerning the interpretation of a contract:

> "* * * By Section 1641, Civ. Code, it is made the duty of the Court, in the interpretation of contracts, to give effect to every part thereof, if reasonably practicable. * * *"

Applying the fundamental principle of contract interpretation as set forth in the above quoted sections of the California Civil Code and decided cases to the issue here involved, it can be said that paragraph 8 of the agreement of June 18, 1937, pursuant to which Appellant received dividends in the amount of $6230.00, is just as much a part and parcel of the contract as the provisions of paragraph 1 pursuant to which the Appellant received certain real and personal property. No basis exists for selecting a particular three line portion of paragraph 1 and stating that it is representative of the exclusive intention of the parties. Instead, reference might well be made to that portion of the agreement of June 18, 1937 (R. 39, 40) which reads as follows:

> "Now, Therefore, This Agreement Further Witnesseth:
>
> "That, for the purpose of compromising and settling, without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr. * * * the said Linda Hoag Hale, in her individual capacity and as executrix aforesaid, and the said Prentis Cobb Hale, Jr., in his individual capacity and as executor aforesaid, do hereby respectively covenant and agree as follows:"

The introductory paragraph to the agreement partially quoted above clearly indicates that the entire

agreement, and not only paragraph 1 thereof, represented the agreement of the parties and in its entirety was intended to represent the basis for compromising and settling without litigation the controversy which had arisen between the parties. There is, accordingly, no basis whatsoever for selecting a relatively small portion of one paragraph of the agreement as being representative of the entire agreement and intention of the parties.

Since Section 1650 of the California Civil Code hereinbefore quoted provides that particular clauses of the contract are subordinate to its general intent, it is clear that the quoted portion of the contract of June 18, 1937 relied upon by Appellee is subordinate to the general intention of the parties which is expressed in the contract (R. 39) to the effect that the agreement is "* * * for the purpose of compromising and settling, without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr. * * *"

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2. **CONTENTION OF APPELLEE THAT $6230.00 REPRESENTED INCOME EARNED ON APPELLANT'S COMMUNITY PROPERTY INTEREST.**

Appellee states in his brief (Br. 12) that the income of $6230.00 earned subsequent to her husband's death was alloted to Appellant not because it represented part of the value of her claimed community interest but *presumably because it represented income earned on that property interest, and to which she was en-*

titled, citing *Estate of Daly,* 202 Cal. 284, 260 Pac. 296 (italics supplied).

It is believed by Appellant that the decision in the case of the *Estate of Daly* cited by Appellee is not at all pertinent to a decision in our case because the facts in the *Estate of Daly* are entirely different from the facts in our case. It is also believed by Appellant that no basis in law exists to support the claim of Appellee italicized above to the effect that the $6230.00 received by Appellant was distributed to her

> "* * * presumably because it represented income earned on that property interest subsequent to her husband's death, and to which she was therefore entitled. * * *"

These two contentions of Appellant will be discussed in the order mentioned.

The facts in the *Estate of Daly* are stated by the Court to be as follows (260 Pac. at page 297):

> "* * * In the third paragraph the testator bequeathed one-half of 15,377½ shares of the Dairy Delivery Company, a corporation, then owned by him, to the Appellant * * * The Court made its order distributing to her (appellant) one-half of said stock, but denied the petition for the distribution to her of one-half of the income therefrom. It is from that portion of the order denying the distribution of the income from one-half of the stock that this appeal is taken."

The Court held that the widow was entitled to the dividends which accrued after the death of her husband on the stock which was specifically bequeathed

to her and stated in part as follows (260 Pac. at page 297):

> "The bequest to the widow of one-half of the stock of the Dairy Delivery Company being a 'legacy of a particular thing, specified and distinguished from all others of the same kind', was, of course, a specific bequest * * * (citing authorities) * * * and 'specific legacies carry with them all accessions by way of dividends or interest that may accrue after the death of the testator' * * * (citing authorities) * * *"

Appellant concedes the correctness of the decision of the California Supreme Court in the *Estate of Daly* but contends that the factual situation is such that the principle of the *Estate of Daly* has no application to our case. It will be observed that, in the *Estate of Daly,* a specific bequest of a particular stock was provided for in the decedent's will. In our case, the will of Prentis Cobb Hale, Sr. not only failed to make a bequest of specific securities or property to Appellant representative of her community interest but also omitted to make any general provision for property to be distributed to Appellant in an amount equal to her community interest, and instead, the will contained an express provision denying the Appellant's right to any community interest under the provision of Article Fourth of his will (R. 44) which reads in part:

> "I believe and declare that all property which I own, or in which I have any interest is my own separate property * * *"

The will therefore in our case purported to deny Appellant any community interest, and, if the will had been probated in accord with its provisions as drafted by the testator, Appellant would have succeeded to no community interest whatsoever in his Estate. Instead of accepting the provisions of her husband's will, Appellant asserted a community interest in his Estate and was prepared to litigate her rights if they were not conceded. The compromise agreement of June 18, 1937 resulted in the distribution to Appellant of the property referred to in paragraph 1 thereof (R. 40) and also the dividends of $6230.00 provided for in paragraph 8 thereof (R. 42). It is apparent therefore that Appellant received the real and personal property and the dividends, not under any provision of the decedent's will, but instead, under a compromise agreement which directly conflicted with the statement in decedent's will that he believed all of his property was his own separate property. It is clear, therefore, that Appellant received the property obtained by her from her husband's Estate, not by specific bequest, as in the case of the *Estate of Daly,* but instead, by reason of a negotiated contract not only entirely independent of but in direct conflict with the provisions of her husband's will.

It is desired to point out in this connection that the failure to recognize this basis for the acquisition by Appellant of the property and dividends received by her, formed one of the fundamental errors in the opinion of the District Court because it is observed

that the opinion of the District Court (R. 16) uses the following language which apparently was taken directly from the decision of the California Supreme Court in the *Estate of Daly:*

> "* * * a specific bequest carries with it all accessions by way of dividends or interest that may accrue after the death of testator * * *"

Since no specific bequest or in fact any bequest to Appellant by the will of her husband is involved in our case, it is submitted that the decision in the *Estate of Daly* is wholly irrelevant and that the opinion of the District Court based largely thereon is in error to the extent that it is founded upon such claimed authority.

Reference will now be made to that portion of Appellee's Brief in which it is stated (Br. 12) that the $6230.00 represents income earned on the community property interest of Appellant and to which she was entitled.

Neither Appellant nor Appellee makes any contenition that the specific items of property distributed to Appellant under paragraph 1 of the agreement of June 18, 1937 are identifiable as particular items of community property of the type recognized for Federal taxes as belonging to the community. Indeed, the record is clear (R. 58) that it was not possible to ascertain the portion of the decedent's estate that represented community property acquired after July, 1927. Accordingly, the property distributed to Appellant under paragraphs 1 and 8 of the agreement of

June 18, 1937 is considered to be merely representative of the value of appellant's community interest which was agreed upon in order to avoid contemplated litigation. It follows, therefore, that the income from such property is similarly not capable of being identified as income from community property and most certainly there is no showing in the record that the dividends of $6230.00 represented income from community property acquired after July, 1927, which community property is the only type recognized for Federal income tax purposes. Under these circumstances, it is contended by Appellant that, even if the income of $6230.00 attributable to some of the specific items of property distributed to her is regarded as community income (a fact which is of course not conceded by Appellant), still such income would not belong as a matter of right to Appellant under the laws of the State of California and is not taxable to Appellant under the Federal Court decisions presently to be cited.

The California Probate Code provides in part as follows (Section 202):

> "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this Code * * *"

By the plain provision of Section 202 of the California Probate Code, therefore, the income applicable to community property does not as a matter of right

belong to the surviving wife, but, instead, it is subject to administration and the payment of debts. This view is also confirmed by the decision of this Court in the case of *Commissioner v. Larson,* 131 F. (2d) 85, to be referred to presently.

It is further observed that, under the agreement of June 18, 1937, Appellant received, not an item of *net* income, but rather the *gross* dividends on certain securities (see Appellant's Opening Brief, page 15). Whatever plausibility may attach to the claim that Appellant as a matter of law was entitled to an amount of *net income* by reason of her community interest or as the life tenant under the testamentary trust, certainly the agreement of June 18, 1937 can form the only basis for distributing to Appellant out of estate funds the *gross* dividends of $6230.00 undiminished by any expenses whatsoever.

The question of the treatment to be accorded income from community property during administration of the husband's estate has been directly presented to this Court and decided in two cases; namely, *Rosenberg v. Commissioner,* 115 F. (2d) 910 (C.C.A. 9), decided November 29, 1940, and *Commissioner v. Larson,* 131 F. (2d) 85 (C.C.A. 9), decided October 21, 1942.

In the case of *Rosenberg v. Commissioner,* taxpayer contended (115 F. (2d) at page 912):

> "* * * that the wife's share of the community property, for the purpose of the Federal income tax, 'is not and cannot be a part of the "estate" of her deceased husband.' "

The Court stated it was unable to agree with the contention made by the taxpayer and stated its conclusion as follows (115 F. (2d) at page 912):

> "We conclude that the income derived from the community property of the decedent in the hands of the executor of his will was subject to taxation as a part of the income of the estate."

In the case of the *Commissioner v. Larson,* the question for decision was the treatment for income tax purposes of community property income received by the Estate of the deceased husband during administration. The Court concluded that community income received during administration should be taxed to the Estate of the deceased husband and used the following language in the course of its opinion (131 F. (2d) at page 87):

> "* * * It has been repeatedly said that upon the death of either spouse, the entire community estate, and not merely the half interest of decedent, is subject to administration * * * (citing cases) * * *"
>
> "We think it is clear from these authorities, that the 'ownership' of the income from Community property during administration and liquidation thereof, is in the executor or administrator, and that therefore he should report such income in the income tax return of the estate."

Summarizing Appellant's position with respect to this phase of Appellee's argument, it can be said:

> (a) There is nothing in the record to show that the income of $6230.00 distributed to Appel-

lant represented income from specific items of community property and, on the contrary, the record shows (R. 58) that it was impossible to ascertain the extent of the community property of the estate acquired subsequent to July, 1927;

(b) Even if the record showed that the $6230.00 represented income from specific items of community property acquired subsequent to July 1927, still, under the California Probate Code (Section 202), such income was subject to administration and the payment of debts under California law and was therefore income to which Appellant was not entitled as a mater of law;

(c) Even if the dividends of $6230.00 are conceded to represent income from community property acquired subsequent to July 1927, still, under the decisions of this Court, rendered in the cases of *Rosenberg v. Commissioner* and *Commissioner v. Larson* heretofore cited, such income is taxable to the estate of the decedent and not to Appellant.

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3. **CONTENTION OF APPELLEE THAT DECREE OF DISTRIBUTION MADE BY PROBATE COURT SUPPORTS POSITION THAT $6230.00 WAS NOT A PART OF APPELLANT'S COMMUNITY INTEREST.**

Appellee suggests that because the income of $6230.00 was distributed to Appellant by a decree entirely independent of the decree by which the real property and securities were delivered, said income

was not regarded by the Court as a part of Appellant's Community interest (Br. 12, 13, 14).

Appellant submits that the conclusion of the Appellee concerning the theory and opinion of the California Probate Court in rendering its decree distributing the income of $6230.00 to Appellant is unwarranted and, in support of this contention, submits the observation that the decree of December 22, 1937 distributing this income to Appellant was made under and pursuant to the specific agreement of the parties to the agreement of June 18, 1937 (R. 43). That is, paragraph 8 of the agreement of June 18, 1937 specifically provided that the dividends there involved might be distributed pursuant to a Decree of Partial Distribution. Accordingly, the Court, in rendering its decree, was merely carrying out the purpose and intention of the parties to the agreement of June 18, 1937. The Court did not render an opinion in the matter. There was no contest concerning the decree. There was a total absence of any issue for the Court to decide and, as a consequence, it is difficult to perceive upon what basis the Court can be stated to have an opinion or theory if no issue or problem was presented to the Court. If any intention or purpose is to be assigned to the Decree of Partial Distribution, it is the intention which must be ascribed to the parties to the agreement of June 18, 1937 and not to the Court which rendered a Decree, in the application for which all parties acquiesced.

It is fundamental that decrees rendered by the Probate and other Courts of the various states are not

binding upon the Treasury Department and have no effect for Federal tax purposes unless there is an issue actually litigated by persons having adverse interests. See

Freuler v. Helvering 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634.

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4. **CONTENTION OF APPELLEE THAT THE $6230.00 WAS PROPERLY PAID TO APPELLANT AND THEREFORE DEDUCTIBLE BY THE ESTATE UNDER SECTION 162(c) OF THE REVENUE ACT OF 1936.**

The Appellee contends that the amount of $6230.00 was properly paid by the Estate to Appellant in 1937 and was, therefore, deductible by the Estate and taxable to Appellant as income under Section 162(c) of the Revenue Act of 1936 (Br. 14, 15, 16). Section 162(c) is quoted in full in the Appendix to Appellant's Opening Brief and provides in part that

> "* * * there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

Appellant contends that in order to be deductible to the Estate and taxable to the beneficiary, the amount of income of the estate or trust must be properly paid or credited to a legatee, heir or beneficiary *as income.*

See *Burnet v. Whitehouse,* 283 U. S. 148, 75 L. Ed. 917, 51 S. Ct. 374. In this latter case, the will of the decedent gave to Mrs. Whitehouse an annuity. The annuity was paid out of income of the estate and the question was whether the amount of the annuity was deductible by the estate and taxable to the recipient or whether the amount should be reported by the estate. The United States Supreme Court held that the amount received by Mrs. Whitehouse was not taxable as income and stated that Section 219 of the Revenue Act of 1921 (which provided that there should be included in the taxable income of an individual the income of estates including "* * * income which is to be distributed to the beneficiaries periodically * * *") applies only to income paid as such to a beneficiary. The Court said:

> "* * * but clearly enough, we think, this section applied only to income paid as such to a beneficiary * * *"

As a further illustration of an instance in which income received by an estate as such and distributed by the estate to an heir is taxable to the estate of a decedent and is not taxable to the recipient, see *Buck v. McLaughlin,* 48 F. (2d) 135 (C.C.A. 9). In this case the Court held that the amount received by a widow as a family allowance pursuant to California law was not taxable income to her and in the course of its opinion stated in part as follows (48 F. (2d) at 137):

> "We think it quite immaterial in determining the taxability of the amount received by the

widow as to whether it comes from the corpus or income in the hands of the executor * * *"

As pointed out in Appellant's Brief (pages 19, 20), not all items of estate income distributed by an estate may be deducted by the estate and taxed to the recipient. When gross or net income is received by an estate and is paid out in settlement of money loaned or advances made, or in settlement of other claims, the payee may be in receipt of income received by the estate, but if he does not receive such funds *as income,* certainly the recipient is not taxable upon the receipt of same. It is Appellant's contention that the $6230.00 was paid to her by the Estate of Prentis Cobb Hale, Sr. in order to settle her claim of community interest in the decedent's Estate and on the contrary that sum of $6230.00 was not paid to her as income. See in this connection Appellant's previous comments in this Brief showing that she had no right under her husband's will to any community interest in her husband's estate and, therefore, the amount of $6230.00 together with the real and personal property referred to in paragraph 1 of the agreement of June 18, 1937 must have been paid to Appellant in settlement of her community interest and not by reason of any fundamental right to the income on such property.

It is further observed that the answer of Appellee shows the amount of $6230.00 to have been received under the terms of the agreement of June 18, 1937 (Complaint, paragraphs IV and V (R. 3-5) and Answer, paragraphs II and III (R. 8, 9)).

As a corollary to the proposition that the item of $6230.00 was received by Appellant under the terms of the compromise agreement of June 18, 1937, Appellant contends that the decision in *Lyeth v. Hoey,* 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, is controlling to the effect that the property so received by Appellant is received by reason of her interest as an heir of her husband's estate and therefore exempt from income tax under Section 22(b)(3) of the Revenue Act of 1936. This latter section is quoted in full in Appendix to Appellant's Opening Brief.

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5. CONTENTION OF APPELLEE THAT $5450.00 PAID TO APPELLANT WAS PROPERLY PAID TO HER AND TAXABLE TO HER.

Appellee contends (Br. 16) that the amount of $5450.00 distributed to Appellant from the testamentary trust under the will of Appellant's husband was properly payable to Appellant and therefore taxable to her under Section 162(c) of the Internal Revenue Code.

The circumstances surrounding the receipt by Appellant of the item of $5450.00 are substantially different from the circumstances concerned with the receipt of the $6230.00 heretofore referred to in this brief. The dividends of $5450.00 here involved were received by the executors of the Decedent's estate prior to July 29, 1937, the date certain securities were distributed to the testamentary trustee. It is Appellant's position that, under the decisions of the Cali-

fornia Supreme Court and Appellate Court in the following cases, the amount received by Appellant was not legally payable to her and therefore the receipt of this money by her may not be regarded as income to Appellant.

In the *Estate of Brown,* 143 Cal. 450, 77 Pac 160, and *Clayes v. Nutter,* 49 Cal. App. 148, 192 Pac. 870, the rule was stated unqualifiedly that, unless a testamentary trust can be regarded as a trust for maintenance, the life tenant is not entitled to the income therefrom accruing from the date of death and prior to the distribution of the trust property to the trustees. The following quotation is taken from the case of *Clayes v. Nutter,* 192 Pac. at page 871:

> "* * * Under this will it was necessary for the trustees to receive the trust property and invest the same, so as to obtain an income before it was possible for them to make any payment to Mrs. Clayes under the terms of the will."

In other words, until the trust comes into existence by formal distribution of the trust property, no trust exists from which income may be paid to the life tenant. Accordingly, if, as in the Appellant's case, moneys are paid to her to which she has no legal right, such funds when received do not constitute taxable income under the decision in *Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634. This latter case states very clearly that the test of taxability to the beneficiary is not receipt of income but the present right to receive it. The Court further stated (291 U. S. at page 42):

"* * * Clearly an overpayment to a beneficiary by mistake of law or fact, would render him liable for the taxable year under consideration, *not on the amount paid, but on that payable* * * *" (italics supplied).

Appellee suggests that the trust here involved might be regarded as a trust for maintenance resulting in the right to pay Appellant the income on the trust property from the date of death and cites *Estate of Ballou,* 181 Cal. 61. The *Estate of Ballou* involved a consideration of whether a legacy in the amount of $10,000.00 given to an adopted child should be regarded as a legacy for maintenance for the purpose of computing interest and the Court held that it should be so regarded. It will be observed that in Appellant's case we are dealing with the question of income from a testamentary trust and not a specific legacy, and, accordingly, the *Estate of Ballou* involves a different set of facts. It certainly is not in point in comparison with the authorities cited by Appellant; namely, *Estate of Brown* and *Clayes v. Nutter,* which cases directly concern the date as of which income should be paid to a life tenant from a testamentary trust established by a testator.

In the event Appellant's husband had desired to cause the testamentary trust to be regarded as a trust for maintenance with the consequence that the income applicable thereto would be payable from date of death, it would have been only necessary for him to have stated that the trust was a trust for maintenance or that the income therefrom should be paid from the

date of death. See in this connection Article Twelfth of testator's will in which he provides that $10,000.00 be delivered to Appellant "at the earliest possible moment after my death" (R. 45). The trust, however, contained no such provisions, and, instead, it was provided in Article Fourth of the testator's will (R. 44, 45) that the property of the trust be diminished to the extent of any property distributed to Appellant under a community property claim. It appears therefore that, so far as the intention of the testator may be determined by reference to the language used in creating the trust, he did not consider it necessary to designate it as a trust for maintenance.

Notwithstanding Appellee's comments to the contrary (Br. 21), Appellant further submits that, since she was adequately provided for by income from sources independent of the testamentary trust such as the family allowance of $1500.00 per month (R. 44) and other income, the aggregate of which was $57,016.72 for the calendar year 1937 (R. 64), the testamentary trust can not be regarded as a trust for her maintenance. In this connection, reference is again made to the *Estate of Brown,* 143 Cal. 450, 77 Pac. 160, in which a testamentary trust which directed $20.00 per month to be paid to a half-sister of the decedent's husband was not regarded as a trust for maintenance, even though the life tenant was a confirmed cripple and was dependent upon the income of the trust for support. If, under such circumstances, the Court was of the view that the life tenant was not entitled to the income of the trust property until it

was distributed to the trustees, it is difficult to understand how a different conclusion could be reached under the circumstances surrounding the testamentary trust in Appellant's case.

Summarizing this phase of Appellant's case, it is contended that Appellant was not entitled to the amount of $5450.00 in dividends received from the testamentary trustees representing income accrued between the date of her husband's death and the date the securities were distributed to the testamentary trustees and that, under the decision in *Freuler v. Helvering* heretofore cited, the test of taxability is not the receipt of income but the right of a beneficiary to receive the same.

Dated, San Francisco,
November 8, 1943.

Respectfully submitted,
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Attorney for Appellant.